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Nos. 94-1829 & 94-1976

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ALASKA FISH AND WILDLIFE FEDERATION
AND OUTDOOR COUNCIL, INC., *et al.*,
Petitioners,

v.

STATE OF ALASKA,
Respondent,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR,
et al.,
Respondents.

LEGISLATURE OF THE STATE OF ALASKA,
Petitioner,

v.

STATE OF ALASKA,
Respondent,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR,
Respondent.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
For the Ninth Circuit

PRIVATE RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The State of Alaska abandoned its interlocutory appeal from a district court holding that the Secretaries of the Interior and Agriculture are authorized by Title VIII of the Alaska National Interest Lands Conservation Act ("ANILCA"), 16 U.S.C. §§ 3111 *et seq.*, to implement a regulatory program to ensure a priority for subsistence uses of fish and wildlife on federal "public lands" by rural Alaska residents. The Alaska Legislature and a group of private citizens, Alaska Outdoor Council, *et al.*, who were not parties to the case, separately sought, but were denied, leave to intervene in the Court of Appeals for the purpose of reviving and pursuing the State's appeal. The questions presented are:

1. Whether the merits of the underlying claim abandoned by the State are sufficiently colorable to warrant this Court's consideration of the non-party Petitioners' contentions that they have the capacity and standing to sue necessary to intervene and resurrect that claim?

2. Whether Petitioners have the capacity under State law to prosecute a lawsuit asserting Alaska's sovereign interests when the State itself has declined to pursue the suit?

3. Whether Petitioners have established the standing necessary to support intervention for the purpose of reviving the State's withdrawn appeal?

4. Whether the Court of Appeals abused its discretion in denying intervention?

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PRIVATE RESPONDENTS' BRIEF IN OPPOSITION[1]

This is a case about the case that isn't there. In the underlying case below, the State of Alaska, acting through its Governor and Attorney General, had argued in the district court that the Secretaries of the Interior and Agriculture ("the Secretary") had not been empowered by Congress, in the Alaska National Interest Lands Conservation Act ("ANILCA"), Pub. L. 96-487 (Dec. 2, 1980), 94 Stat. 2371, to implement a regulatory regime to assure a statutory priority for rural Alaska residents to engage in subsistence uses of fish and wildlife on federal public lands within the State. Although the State initially took an interlocutory appeal from the district court's adverse resolution of this issue, the State stipulated to a dismissal of its appeal as to that issue prior to oral argument in the Ninth Circuit, and the appeal as to that issue was dismissed with prejudice. The Alaska Legislature, followed by the Alaska Fish and Wildlife Federation and Outdoor Council, Inc., *et al.* ("Outdoor Council" or "AOC"), attempted to intervene in the Ninth Circuit for the purpose of resurrecting the issue, but their efforts were rejected. Both the Outdoor Council (No. 94-1829) and the Legislature (No. 94-1976) seek review of the Ninth Circuit's orders (AOC App. 1a-10a; Leg. App. A-1 through A-5) denying leave to intervene. This case raises no

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[1] Private respondents are the non-governmental parties in two cases which were consolidated for disposition below: *Katie John v. United States*, No. A90-0484-CV (D. Alaska) (HRH), and *Alaska v. Babbitt*, No. A92-0264-CV (D. Alaska) (HRH) (March 30, 1994) (AOC App. 23a; Leg. App. A-12), *rev'd in part*, *Alaska v. Babbitt*, 54 F.3d 549 (9th Cir. 1995) (AOC App. 11a; Leg. App. A-54). Private respondents are the plaintiffs in the *Katie John* case, who are two individual Alaska Natives (Katie John and Doris Charles) and a federally recognized Indian tribe (Mentasta Village Council); and the Alaska Federation of Natives ("AFN"), a statewide Native organization, which was permitted to intervene as a defendant and to file a cross-claim against the federal defendants in the *Alaska v. Babbitt* case. (Prior to consolidation of the cases, AFN also participated in Katie John as *amicus curiae* in support of plaintiffs.)

issue warranting the exercise of this Court's certiorari jurisdiction.[2]

COUNTERSTATEMENT

The Statutory Framework

In the 1980 enactment of ANILCA, Congress undertook two principal comprehensive purposes: (1) to set aside, expand or redesignate vast tracts of the public domain in Alaska as national parks and preserves, national monuments, national wildlife refuges, national forests, national wild and scenic rivers, national wilderness areas, national conservation and recreation areas, and the like, in order to preserve the natural features and resources of those lands and waters for present and future generations; and (2) "to protect the resources related to subsistence needs" and "provide the opportunity for rural residents engaged in a subsistence way of life to continue to do so." ANILCA §§ 101(a)-(c), 94 Stat. at 2374-75, 16 U.S.C. §§ 3101 (a)-(c). With respect to the latter purpose -- protecting the subsistence way of life of rural residents -- Congress in Title VIII generally impressed all "public lands" in Alaska[3] with a preference for subsistence uses of fish and wildlife over all other uses. §§ 801-816, 94 Stat. at 2422-30, 16 U.S.C. §§ 3111-3126.

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[2] We note that, in contravention of this Court's Rule 12.2, the Outdoor Council has joined its petition for a writ of certiorari (No. 94-1829) with a motion for leave to intervene. Inasmuch as there is (and can be) no case pending in this Court in which to intervene, and no decision of the Ninth Circuit below on the issue of the Secretary's management authority, the Outdoor Council's motion for leave to intervene is senseless.

[3] "Public lands" are defined as "lands, waters, and interests therein, the title to which is in the United States." *Alaska v. Babbitt*, 54 F.3d at 552 (Leg. App. A-59), *citing Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 548 n.15 (1987) (paraphrasing and melding the definition in ANILCA §§ 102(1)-(3), 16 U.S.C. §§ 3102(1)-(3)).

Although it was the primary intent of Congress to protect the subsistence way of life of Alaska Natives, Congress in the end extended the preference to "rural residents" in an attempt to accommodate Alaska's concern that it would not be able under the Alaska Constitution to afford a subsistence-priority right limited to Alaska Natives. *See Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 313 n.1 (9th Cir. 1988) (Kozinski, J.), *cert. denied*, 491 U.S. 905 (1989). Accordingly, in Title VIII of the Act, Congress found that

> in order to fulfill the policies and purposes of the Alaska Native Claims Settlement Act [of 1971] and as a matter of equity, it is necessary for the Congress to invoke its constitutional authority over Native affairs and its constitutional authority under the property clause and the commerce clause to protect and provide the opportunity for continued subsistence uses on the public lands by Native and non-Native rural residents.

ANILCA § 801(4), 16 U.S.C. § 3111(4).[4] Congress declared its policy to be that "nonwasteful subsistence uses of fish and wildlife and other renewable resources shall be the priority consumptive uses of such resources on the public lands of Alaska." § 802(2), 16 U.S.C. § 3112(2). The Act confers a priority for subsistence uses on the "public lands" (§ 804), and defines subsistence uses as the "customary and traditional uses" of fish and wildlife resources by "rural Alaska residents" (§ 803). 16 U.S.C. §§ 3113, 3114.

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[4] Congress determined that the opportunity for continued subsistence uses "is essential to Native physical, economic, traditional, and cultural existence and to non-Native physical, economic, traditional, and social existence" (§ 801(1)), but that the opportunity "is threatened by the increasing population of Alaska" and the "increased accessibility of remote areas containing subsistence resources," among other things (§ 801(3)).

Congress also sought to accommodate Alaska in another way, by enabling the State to have primary regulatory responsibility for assuring the priority for subsistence uses of fish and wildlife by rural residents on the public, as well as State, lands. In § 801(5) of the Act, Congress found that

> the national interest in the proper regulation, protection, and conservation of fish and wildlife on the public lands in Alaska and the continuation of the opportunity for a subsistence way of life by residents of rural Alaska require that an administrative structure be established for the purpose of enabling rural residents who have personal knowledge of local conditions and requirements to have a meaningful role in the management of fish and wildlife and of subsistence uses on the public lands in Alaska.

16 U.S.C. § 3111(5). Section 805 specifies the "administrative structure" through which Congress sought to ensure this "meaningful role" -- through the primary implementation, depending upon compliance with certain conditions, by either the State or the federal government. 16 U.S.C. § 3115.

Section 805(a) directs the Secretary, one year after ANILCA's enactment, to establish a local and regional participation scheme consisting of at least six subsistence resource regions with a regional advisory council (composed of residents of the region) in each region, and also (if he finds the State's committees to be inadequate) a system of local advisory committees. Subsections 805(a)(3)(A)-(C) provide that the regional councils shall have the authority to review and evaluate "proposals for regulations, policies, management plans and other matters relating to subsistence uses," provide a forum for local viewpoints, and encourage "local and regional participation . . . in the decision making process affecting the taking of fish and wildlife on the public lands within the region for subsistence uses." Subsection 805(a)(3)(D) directs the councils to prepare annual reports to the Secretary identifying

and evaluating subsistence uses and needs, recommending a "strategy for the management of fish and wildlife populations within the region to accommodate such subsistence uses and needs," and, finally, making "recommendations concerning policies, standards, guidelines, and regulations to implement the strategy." And § 805(b) directs the Secretary to adequately staff the regional councils and provide them with timely information.

Section 805(c) then mandates that the Secretary shall (absent specified circumstances) implement the regional council recommendations, in the following terms:

> The Secretary, in performing his monitoring responsibility pursuant to section 806 and in the exercise of his closure and other administrative authority over the public lands, shall consider the report and recommendations of the regional advisory councils concerning the taking of fish and wildlife on the public lands . . . for subsistence uses. The Secretary may choose not to follow any recommendation which he determines is not supported by substantial evidence, violates recognized principles of fish and wildlife conservation, or would be detrimental to the satisfaction of subsistence needs. If a recommendation is not adopted by the Secretary, he shall set forth the factual basis and the reasons for his decision.

16 U.S.C. § 3115(c).

Subsections 805(a) through (c) thus clearly direct the Secretary to implement a comprehensive subsistence-use management system on the public lands. In addition, § 814 explicitly directs that the Secretary "shall prescribe such regulations as are necessary and appropriate to carry out his responsibilities under this title [VIII]." 16 U.S.C. § 3124. But the State is then given the power to supplant federal management by § 805(d), 16 U.S.C. § 3115(d), which provides:

> The Secretary shall not implement subsections (a), (b), and (c) of this section if within one year of the date of enactment of this Act, the State enacts and implements laws of general applicability which are consistent with, and which provide for the definition, preference, and participation specified in, sections 803, 804, and 805, such laws, unless and until repealed, shall supersede such sections insofar as such sections govern State responsibility pursuant to this title for the taking of fish and wildlife on the public lands for subsistence uses.[5]

Finally, § 807(a), 16 U.S.C. § 3117(a), affords a private right of action in federal court to enforce the subsistence priority against either the State or the Secretary, by providing that subsistence users

> aggrieved by a failure of the State or the Federal Government to provide for the priority for subsistence uses set forth in section 804 (or with respect to the State as set forth in a State law of general applicability if the State has fulfilled the requirements of section 805(d)) may, upon exhaustion of any State or Federal (as appropriate) administrative remedies which may be available, file a civil action in the [federal court] to require such actions to be taken as are necessary to provide for the priority.[6]

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[5] Section 805(e) requires the Secretary to reimburse the State for no more than fifty percent of the annual costs of operating the regional council/local committee system (16 U.S.C. § 3115(e)); these federal payments never exceeded one million dollars in any one year (substantially less than 50% of the State's actual costs).

[6] The section continues by authorizing preliminary injunctive relief in "appropriate" circumstances, and by specifying the scope of final relief that

Congress expressly acknowledged that by the above provisions it has imposed conditions on the State's "traditional" authority to regulate the taking of fish and wildlife on the public domain. Consequently, ANILCA § 1314 states that "[n]othing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands *except as may be provided in Title VIII*, or to amend the Alaska constitution," nor "to enlarge or diminish" the Secretary's responsibility and authority over management of the public lands "*[e]xcept as specifically provided otherwise by this Act.*" 16 U.S.C. §§ 3202(a) and (b) (emphases added).

The Background Of This Litigation

Beginning prior to the enactment of ANILCA,[7] and continuing until the spring of 1993, every Governor, Attorney General and Legislature of Alaska, every Secretary of the Interior, and every state and federal court to consider the matter, concluded that § 805 of ANILCA requires the Secretary to implement a subsistence-preference management program on the public lands if the State either fails to enact, or if it repeals, State laws of general applicability that conform with the

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may be granted in an action against the State, namely, an order "directing the State to submit regulations which satisfy the requirements of section 804; when approved by the court, such regulations shall be incorporated as part of the final judicial order, and such order shall be valid only for such period of time as normally provided by State law for the regulations at issue." 16 U.S.C. § 3117(a).

[7] After the House of Representatives had passed an earlier version of ANILCA in 1978, the Alaska Legislature responded by enacting the State's first subsistence-preference law, reprinted in *Bobby v. Alaska*, 718 F. Supp. 764, 788-91 (D. Alaska 1989). The State's 1978 law was modelled on the earlier 1978 House of Representatives' version, which did not prescribe a rural preference. *See Madison v. Alaska Dept. of Fish & Game*, 696 P.2d 168, 176-77 n.13 (Alaska 1985).

requirements of §§ 803-805 of the Act.[8] On May 14, 1982, Secretary Watt wrote Governor Hammond certifying the State's statutory and regulatory program as complying with §§ 803-805, and expressing his determination that "[a]s a result of this certification of compliance, the State retains its traditional role in the regulation of fish and wildlife resources on the public lands in Alaska."[9] When the Alaska Supreme Court thereafter held that the part of the State's regulatory program restricting the State-law subsistence priority to rural residents was inconsistent with the then-extant version of the State statute, *Madison v. Alaska Dept. of Fish & Game*, 696 P.2d 168 (Alaska 1985), the Legislature promptly amended the statute so as to afford the priority to residents of "rural areas," in the hope of complying with ANILCA and retaining State subsistence management authority on the public lands. *See Kenaitze Indian Tribe v. Alaska*, *supra*, 860 F.2d at 314; *Bobby v. Alaska*, 718 F. Supp. 764, 768 (D. Alaska 1989).

Unexpectedly in December of 1989, however, the Alaska Supreme Court held that the Alaska Constitution prohibits the Legislature from providing a priority for subsistence uses that is limited to rural residents. *McDowell v. State*, 785 P.2d 1 (Alaska 1989) (decision stayed until July 1, 1990). The court acknowledged the pre-emptive scope of ANILCA,[10] and that

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[8] Private respondents introduced in the record below extensive documentation of this contemporaneous and consistent interpretation and application of the Act by four different (Republican and Democrat alike) Alaska Governors, Attorneys General and Legislatures, and by three different Interior secretaries, spanning more than a decade. *See* Clerk's Record at Docket No. 133, Exhibits 1-21.

[9] Reprinted in *Bobby v. Alaska*, *supra*, 718 F. Supp. at 812-13.

[10] *See* 785 P.2d at 3 ("ANILCA requires federal management of public lands in Alaska in order to ensure the subsistence priority. However, federal management may be supplanted by the state so long as the state enacts and implements laws `which are consistent with, and which provide

the result of its holding would be the loss of State subsistence-management authority on federal lands and waters. *Id.* at 10 n.20.

In the wake of the *McDowell* decision, the Secretary, effective July 1, 1990, implemented a subsistence management program for the public lands in Alaska. 55 Fed. Reg. 27,114 (June 29, 1990) (temporary subsistence management regulations); 57 Fed. Reg. 22,942 (May 29, 1992) (permanent regulations). That program has been in effect, and the State's authority over uses of fish and wildlife on the public lands correspondingly circumscribed, for over five years. The State made no attempt to enjoin the implementation of that program.[11]

On December 5, 1990, private respondents initiated suit against the Secretary in *Katie John v. United States* (*see* note 1, *supra*), alleging that the federal subsistence program mandated by ANILCA had been unlawfully restricted by excluding from its coverage navigable waters in which the United States owned interests. Over a year later, on February 27, 1992, the State, by its Attorney General, filed its complaint, *Alaska v. Babbitt*, the principal focus of which alleged that the Secretary had asserted subsistence-management jurisdiction over certain navigable

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for the definition, preference, and participation specified in' ANILCA," *quoting* 16 U.S.C. § 3115(d) (footnotes omitted)).

[11] Petitioner Outdoor Council, however, is party to a lawsuit filed in June 1990 alleging that ANILCA's subsistence preference for rural residents violates the United States Constitution. *McDowell v. United States*, No. A92-531-CV (D. Alaska) (HRH) (Oct. 7, 1992) (*McDowell II*), *vacated on other grounds and remanded*, No. 93-35200 (9th Cir. July 25, 1994) (unpublished), 32 F.3d 572 (table). That case is now pending in the district court on remand from the Ninth Circuit to determine whether the plaintiffs have established standing.

and non-navigable waters belonging to the State.[12] The cases were consolidated by the district court.

On March 19, 1993, the State filed a motion for partial summary judgment announcing that its review of ANILCA's voluminous legislative history (including hand-written notes from mark-up sessions) had disclosed congressional intent to continue State subsistence management on the public lands even if the State failed or refused to comply with the conditions of § 805(d). The Secretary's authority, under this newly discovered interpretation of the statute, was said to be limited to protection of the habitat of fish and wildlife on federal lands and waters and to conservation-based closures of the public lands to hunting and fishing, but did not include any authority directly related to the "taking" of such resources (the essential component of "subsistence uses"). The State did not dispute that, even if the State were authorized to manage subsistence hunting and fishing, Title VIII of ANILCA establishes the substantive standards governing subsistence uses on federal lands, *i.e.*, that it pre-empts conflicting State law. But the State suggested that the remedy for subsistence users aggrieved by application of the State's non-complying regulatory subsistence-management regime on federal lands would be case-by-case adjudication in the federal court for the District of Alaska, which assertedly had been empowered to issue injunctions requiring State officials to adopt regulations

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[12] In paragraph 9 of its First Amended Complaint filed on March 5, 1993, the State appeared to concede that if Alaska "fails to enact a subsistence law of general applicability consistent with the subsistence priority established in ANILCA, the Secretary of Interior and Agriculture shall undertake to accord a priority to the opportunity to take fish and wildlife for nonwasteful subsistence uses by rural Alaska residents on `public lands.'" Nonetheless, in Count III the State alleged that the regulations the Secretary had promulgated to implement Title VIII "diminish[]" (in some unspecified way) the State's "authority to manage fish and wildlife on the `public lands' and off the `public lands,' in violation of sections 103(c), 1314(a) and (b) of ANILCA" (¶ 27).

(otherwise unlawful under State law) to implement the federal subsistence program mandated by Title VIII.

The district court initially got bogged down in this "legislative history" argument, but in its final decision on the issue the court upheld the authority of the federal government to implement a subsistence-management program on the "public lands," which the court also construed to encompass all navigable waters in Alaska by virtue of the navigational servitude. AOC App. 23a; Leg. App. A-12. The State took a permissive appeal under 28 U.S.C. § 1292(b) as to both holdings of the district court, and the Secretary appealed from the holding as to the navigational servitude (although, during the pendency of the litigation, the Secretary had changed positions and acknowledged that the federal subsistence program should be extended to encompass those navigable waters in which the United States owns reserved water rights[13]).

Prior to the time of oral argument in the Ninth Circuit, the Governor concluded that the State should abandon its appeal insofar as it concerned the issue of the Secretary's authority to provide for the subsistence priority on public lands. The Attorney General accordingly entered into a stipulation dismissing the appeal of that issue with prejudice.[14] On the eve

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[13] The Ninth Circuit ultimately reversed the district court's holding as to the navigational servitude, but it upheld the determination that federally reserved waters are "public lands" under ANILCA. *Alaska v. Babbitt*, 54 F.3d 549 (9th Cir. 1995) (AOC App. 11a; Leg. App. A-54). The State has petitioned for rehearing on that issue, and the Ninth Circuit's mandate has not issued. Consequently, the federal program has not yet been extended to reserved waters, and the magnitude of that extension has not been determined.

[14] The same Attorney General had previously filed an extensive brief on the issue, as well as a reply brief, and had sought permission from the Ninth Circuit to file a 225-page addendum to the merits brief. The proposed addendum contained snippets of ANILCA's massive legislative history. The Ninth Circuit rejected the request. Order of October 19, 1994.

of and following oral argument, the Legislature, and then the Outdoor Council, sought leave to intervene (and other relief) in the Court of Appeals for the purpose of reviving this issue. (The Legislature sought intervention prior to oral argument, but the Outdoor Council did not seek to intervene until after the case had been argued and was under submission.) The pending petitions in this Court arise from the orders denying appellate intervention.

REASONS WHY THE PETITIONS SHOULD BE DENIED

The underlying claim that petitioners seek to revive is devoid of merit. Even if it had merit, moreover, petitioners have demonstrated neither the capacity nor the standing requisite to its pursuit. They have, in all events, presented no issue, and the record supports none, warranting review by this Court.

I. THE UNDERLYING CLAIM IS MERITLESS

In support of its (now-abandoned) contention in the district court that -- contrary to more than a decade of uniform State and federal practice and judicial construction -- the Secretary was not authorized by Congress to implement the subject federal subsistence management program for public lands in Alaska, the State engaged in a strenuous effort to derive support for its position from the voluminous legislative history of ANILCA. In the end, however, the State succeeded only in demonstrating that "this is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood v. United States*, 350 U.S. 366, 374 (1956) (Frankfurter, J.). The State was well-advised to abandon this claim and avoid the further waste of judicial and party resources.

In *New York v. United States*, 112 S. Ct. 2408 (1992), this Court, in discussing the scope of Congress' power under the Commerce Clause, noted that "where Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *Id.* at 2424. The Court observed that "[t]his arrangement, which has been termed `a program of cooperative federalism,' . . . is replicated in numerous federal statutory schemes," specifically including Title VIII of ANILCA. *Id.*, *citing* Judge Kozinski's opinion in *Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 314 (9th Cir. 1988), *cert. denied*, 491 U.S. 905 (1989).

In Title VIII of ANILCA, Congress employed familiar features of both federal pre-emption and cooperative federalism. It "direct[ed] the Secretary of the Interior to establish the administrative structure necessary for the implementation of the statute." *Kenaitze Indian Tribe v. Alaska*, 860 F.2d at 313-14, citing §§ 805(a)-(c), 16 U.S.C. §§ 3115(a)-(c).[15] "The federal regulatory scheme is to be stayed, however, if the state of Alaska enacts laws `which are

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[15] As set forth at pages 4-6 *supra*, the express language of § 805(c) and its surrounding context refute the district court's mistaken reading, relied upon heavily by petitioners, "that Congress unintentionally and inadvertently omitted an express provision authorizing the Secretary to implement Section 804 in the absence of a state program." AOC App. at 36a; *see also id.* at 33a (§ 805(c) "says not a word about implementing the subsistence preference for rural Alaskans created by Section 803 or the subsistence priority created by Section 804").

While § 805(c) does not actually *cite* §§ 803 and 804, it plainly "says a word" about them when it directs the Secretary to follow the comprehensive subsistence-management recommendations of rural regional councils (composed of rural residents) "*concerning the taking of fish and wildlife on the public lands . . . for subsistence uses*" (emphasis added). 16 U.S.C. § 3115(c). Compare the language of § 804, which mandates a priority for "the taking on the public lands of fish and wildlife for nonwasteful subsistence uses." 16 U.S.C. § 3114.

consistent with, and which provide for the definition, preference, and participation specified in, sections 3113, 3114, and 3115 of this title.'" 860 F.2d at 314, *citing* § 805(d), 16 U.S.C. § 3115(d). Congress thus gave Alaska "the choice between federal regulation or self-regulation with federal oversight." *Id.*

Every other court, federal and State, that has looked at Title VIII has reached this same conclusion as to its plain meaning. *See, e.g., Native Village of Quinhagak v. United States*, 35 F.3d 388, 390 (9th Cir. 1994) ("Alaska's noncompliance with ANILCA made the federal government responsible"); *United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) (ANILCA "leaves implementation to the Secretary of the Interior," but it "also contains an opt-in clause for the state of Alaska"); *McDowell v. United States*, No. A92-531 Civil, slip op. at 3-4, 10, 19-26 (D. Alaska Oct. 7, 1992) (*McDowell II*), *vacated on other grounds and remanded*, No. 93-35200 (9th Cir. July 25, 1994) (unpublished); *Kluti Kaah Native Village of Copper Center v. Alaska*, No. A90-004-CV (D. Alaska Aug. 15, 1990); *Bobby v. Alaska*, 718 F. Supp. 764, 766-68 (D. Alaska 1989); *McDowell v. State*, 785 P.2d 1, 3 (Alaska 1989); *Totemoff v. State*, 866 P.2d 913 (Alaska App. 1993), *appeal pending*, No. S-6151 (Alaska)

As Judge Kozinski quite accurately described the scope of the statutory scheme in *Kenaitze Indian Tribe v. Alaska*, *supra*:

> The statute only provides that if the state wishes to regulate in a manner consistent with federal law, *federal regulation will be withheld.* ANILCA does not assign any particular functions to the state as, indeed, it could not. As a separate sovereign, the state is at all times free to refuse to regulate; Congress could not compel it to do so. If the state refuses, *the Department of the Interior will step in and do the job.* The state's role is thus more accurately characterized as supplanting the federal regulatory scheme, rather than implementing it.

860 F.2d at 316 (emphases added).[16] There, too, the State had argued that "ANILCA's legislative history . . . overcomes all other considerations. But legislative history is not a panacea; it cannot overcome the structural and semantic problems discussed above." *Id.* at 318.

The case that petitioners would have this Court resurrect, therefore, would simply have to be interred anew -- even if petitioners had the capacity and the standing to resurrect it. We show, however, that they do not.

II. THE NINTH CIRCUIT CORRECTLY HELD THAT THE ALASKA STATE LEGISLATURE LACKS CAPACITY TO SUE UNDER STATE LAW AND HENCE IS NOT EMPOWERED TO INTERVENE IN THIS ACTION; NEITHER THE LEGISLATURE NOR AOC HAS ESTABLISHED EITHER STANDING OR A RIGHT TO INTERVENE

A. The Alaska Legislature Lacks Capacity to Sue

Although the Legislature variously disguises its petition as raising federal issues of standing or intervention, its real complaint is that the Alaska Governor, through his Attorney General, and not the Legislature, has the right to control litigation brought in the name of the State of Alaska. Indeed, the Legislature is here precisely because the Governor and the

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[16] The court underscored this holding when the State, in its petition for rehearing, argued that the federal Constitution's Guarantee Clause and Tenth Amendment "preclude a federal court from directing a state to amend its laws to make them consistent with ANILCA." 860 F.2d at 318 n.8. The court rejected the argument as irrelevant: "We do not purport to be directing the state to amend its laws; it is free to eschew any further entanglement with the federal government by advising the Department of the Interior that it is withdrawing from its role in administering ANILCA." *Id.*

Attorney General below elected not to pursue what they determined to be a meritless claim. The capacity of the Alaska Legislature to sue on behalf of the State is a quintessential *state law* issue, raising no federal issue worthy of certiorari under this Court's Rule 10.1(a).

The core issue here is one of capacity to sue. Under Rule 17(b) of the Federal Rules of Civil Procedure, the "capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . . ." The law of the State of Alaska, as expressed through its constitution, statutes and common law, vests exclusive authority in the Executive -- the governor and his attorney general -- to bring legal actions in the name of the State.[17] Since Alaska law vests exclusive authority in the Executive to bring such actions, the Legislature lacks the capacity to sue in the name of the State.

This much is clear from the seminal Alaska case on separation of powers, *Public Defender Agency v. Superior*

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[17] Article III, section 1 of the Alaska Constitution expressly vests the executive power of the State in the Governor. Article III, section 16 makes the Governor "responsible for the faithful execution of the laws" and authorizes him exclusively to litigate in the name of the State. To implement sections 1 and 16 of Article III, Alaska Stat. § 44.23.020 charges the Attorney General with the exclusive authority to represent the State and its citizens in all civil actions.

Court, 534 P.2d 947 (Alaska 1975).[18] In *Public Defender*, the Alaska Supreme Court emphasized that the Attorney General:

> is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state's litigation which he thinks best . . . . This discretion over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases.

Id. at 950 (citations and footnotes omitted). For a coordinate branch of government to interfere with the Executive's prerogatives in litigation is to violate the Alaska Constitution's separation of powers. Thus, "the Attorney General cannot be controlled in either his decision of whether to proceed, or in his

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[18] The separation of powers doctrine has been applied by the Alaska Supreme Court in other contexts to limit the Legislature's authority. For instance, in *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976), the Legislature and the presiding officers of each house brought an action against the governor to confirm the constitutionality of a statute requiring legislative confirmation of certain executive branch appointees. The Alaska Supreme Court found the statute unconstitutional, concluding that the Legislature's confirmation power is limited to those officials for whom the constitution requires confirmation. It ruled that the appointment of Executive Branch officers is an executive function, "for without such a power, the responsibility for executing executive duties would be diffused and the goal of separation of branches of government, avoiding too great a concentration of power in one branch, would be defeated." To hold in favor of the Legislature, the court said,

> would emasculate the restraints engendered by the doctrine of separation of powers and result in potentially serious encroachments upon the Executive by the Legislative Branch, because there would be no logical termination point to the Legislature's confirmation of executive appointments.

Id. at 8 (footnote omitted).

disposition of the proceeding." *Id.* In short, as a matter of Alaska law, the Legislature lacks the capacity to pursue an action that has been abandoned by the Executive.[19]

The Petitioner argues that the Ninth Circuit's holding "impermissibly enlarge[s]" the Article III and Fed. R. Civ. P. 24 requirements for intervention in direct conflict with this Court's precedent and that of other circuits. Leg. Pet. at 17. Petitioner misconstrues each of the cases relied on, for none address whether as a matter of state law a legislature can intervene to litigate a state's sovereign interests against the federal government when the state executive has determined not to do so.[20] In no case cited by Petitioners, nor of which we are aware, has a federal court ignored or overridden a state law

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[19] Contrary to Petitioner's claims (Leg. Pet at 20 n.32), the establishment of a legislative council empowered to "do all things necessary to carry out legislative directives and law," cannot overcome the constitutional infirmity that the Legislature possesses only such authority as is granted to it under the Alaska Constitution. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 135 (1976) ("Congress could not, merely because it concluded that such a measure was `necessary and proper' to the discharge of its substantive legislative authority, . . . vest in itself, or in its officers, the authority to appoint officers of the United States" any more than it could "pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in § 9 of Art. I"). Nor can the mere adoption of a resolution by both Houses grant to the Legislature that which the constitution forbids.

[20] Petitioner confuses Article III standing with state law capacity to bring suit. In none of the circuit cases cited by Petitioner was there a state law challenge to the plaintiff's power to bring the litigation. Rather, the challenges were to the plaintiff's Article III standing and/or Fed. R. Civ. P. 24 requisites. And in the two cited Supreme Court cases where a state law challenge was raised, the issue was not rejected out of hand (as the Petitioner suggests), but was carefully considered. Only where *state law* was found to permit intervention was intervention upheld. *See Karcher v. May*, 484 U.S. 72 (1987); *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187 (1972).

prohibition against litigation by a state legislative branch of government where such authority is vested in the executive.

B. Alaska Outdoor Council (AOC) Lacks Capacity to Sue

Through its petition, the AOC Petitioners (private citizens) seek intervention to carry forward the State's challenge to the federal assertion of subsistence management authority over the public lands. Before abandoning its challenge below, the State had argued that ANILCA does not expressly confer such management authority on the Secretary, leaving such authority in the State, despite the incompatibility of its regulatory regime with federal law. By attempting to resurrect these arguments, AOC attempts to press claims aimed at protecting the State's sovereign interests. In doing so, AOC runs up against the same disability as the Legislature, in that AOC also lacks capacity to sue in the State's stead as a matter of state law.

As discussed above, Alaska law vests exclusive authority in the executive to bring actions in the name of the State. Thus, AOC, as a third party, must rest its right to intervene on some state statutory authority granting private individuals the right to represent the State in actions to enforce state interests.[21] But AOC cannot point to such statutory authority because none exists. Alaska has passed no legislation authorizing a private person to represent the interests of the State as a private attorney general in a matter such as this. Absent such authorization, AOC lacks capacity to sue on the State's behalf.[22] *Mountain States Legal Foundation v. Costle*,

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[21] As a matter of federal law it is well established that a third party ordinarily does not have standing to raise the constitutional rights of another person who is not a party to or joined in the suit. *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979).

[22] *See* footnote 11, *supra*.

630 F.2d 754 (1980) (individuals, including state legislators lack standing to raise claims which properly belong to the State).

C. Petitioners AOC And the Alaska Legislature Lack Article III Standing

The Petitioners' lack of capacity to sue undermines their claims to standing and a right of intervention. With respect to Article III standing, the Legislature lacks standing because its legislative powers are not at issue in the underlying claim.[23] Although the merits are not before this Court, the State's original suit contended that the Secretary is not empowered by Congress under Title VIII to regulate subsistence on federal lands, but instead that Congress empowered the federal judiciary alone to enforce Title VIII. Prior to abandoning this claim, the State below never challenged Congress's authority to legislate in this field, just the proper mechanism for implementing supreme federal law.[24] Thus, within the framework of this case it matters not to the State Legislature what branch of the federal government regulates subsistence on public lands; it suffices that Congress has occupied and pre-empted the field. No matter the outcome of the Attorney

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[23] If the Legislature's argument were followed to its logical conclusion, every time the Congress passed a law which pre-empted a field, thereby precluding State legislation in an area, the legislatures of all fifty states would possess Article III standing to challenge it. That is untenable. In such circumstances the legislatures would have nothing more than a generalized grievance about the conduct of government, not a claim founded on injury to the legislature by distortion of the process by which a bill becomes law. *Moore v. U.S. House of Representatives*, 733 F.2d 926 (D.C. Cir. 1984).

[24] Indeed, the State has never disputed the authority of Congress to impose a rural priority for subsistence uses on the public lands, and neither has it contested federal authority to compel State compliance with the priority on the federal public lands.

General's now-abandoned claim, the State Legislature would have no greater or lesser power to legislate. It is for this reason that the Legislature suffered no injury in fact when the Attorney General abandoned his ill-conceived attack on the Secretary's regulatory authority.[25]

As for Petitioner AOC, it has failed to establish the requirements for third-party standing. Standing usually requires a party to assert an injury personal to itself, not an injury to a third party. *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984). As shown above, the claims AOC wants to advance are claims of a third party -- the State of Alaska -- and not AOC's claims. In that situation, *Powers v. Ohio*, 111 S. Ct. 1364 (1991), teaches that a litigant must meet certain requirements:

> the litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in

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[25] Petitioner relies heavily on *Coleman v. Miller*, 307 U.S. 433 (1939); *Karcher v. May*, 484 U.S. 72 (1987); *Barnes v. Kline*, 759 F.2d 21 (D.C. Cir. 1984), *vacated as moot*, *Burke v. Barnes*, 479 U.S. 361 (1987); and *Kennedy v. Sampson*, 511 F.2d 430 (D.C. 1974). These cases are inapposite. Here, the Legislature is not acting to defend the constitutionality of one of its enactments for none is at issue. Further, these cases involved a distortion of the legislative process -- the right of the Legislature to participate and to have its votes given effect. Here there was no similar nullification of a vote or distortion of the process. The Alaska Legislature's right to participate and have its vote counted has in no way been interfered with. *Cf. Chiles v. Thornburgh*, 865 F.2d 1197, 1206-07 (11th Cir. 1989). Moreover, the Legislature's claim of five years of interference with its ability to legislate is belied by its own actions. The challenged regulations have been in effect since the federal takeover following *McDowell v. State*, 785 P.2d 1 (Alaska 1989). The existence and implementation of those regulations did not prevent the Legislature from completely revamping its subsistence law in 1992. *See* Alaska Stat. § 16.05.258, *et. seq.*, Ch. 1 Second Special Session Laws of Alaska 1992.

> dispute"; the litigant must have a close relationship to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Id. at 1370-71 (citations omitted.) AOC fails on all three grounds. AOC's claimed injury to the right of its members to hunt (AOC Pet. at 10) is entirely speculative; there is no causal connection between the alleged injury and the activity complained of (*i.e.*, Secretarial regulation). As discussed above, the claim abandoned below was concerned strictly with *who* -- the State or the federal government -- regulates subsistence hunting and fishing on public lands. Although AOC may have a generalized grievance about who regulates public lands and an abstract desire to force compliance with its view of the law, that in itself is insufficient to show a particularized injury in fact. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2143-45 (1992).

AOC also lacks a "close relationship" with the State, and certainly cannot show that the State is unable to protect its interests. The lack of a "close relationship" with the State is evidenced by the fact that the State no longer agrees with the position it abandoned and that AOC now seeks to pursue. AOC's mere disagreement with the State hardly establishes the State's inability to ably represent its own interests; rather, the State has simply chosen to abandon an ill-conceived claim. *Cf. Diamond v. Charles*, 476 U.S. 54, 62-63 (1986) (standing to represent alleged interest of a state denied when the state did not itself seek judicial review of the lower court decision).

In sum, since AOC is asserting the claims of a third party but has failed to establish the requirements for third-party standing, AOC lacks standing to litigate the abandoned claims on behalf of the State.

D. The Ninth Circuit Did Not Abuse Its Discretion In Denying Petitioner's Request For Intervention Under Fed. R. Civ. P. 24

The Petitioners' lack of standing precludes them from establishing intervention as of right under Fed. R. Civ. P. 24(a)(2).[26] "An intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Article III." *Diamond v. Charles*, *supra* at 68; *Don't Bankrupt Washington Committee v. Continental Bank*, 460 U.S. 1077 (1983) (denying a public interest organization "standing to bring this appeal" where the state government declined to seek review of a lower court decision invalidating a state statute).

Petitioners' lack of standing also precludes permissive intervention under Fed. R. Civ. P 24(b). Since jurisdiction must be grounded on Article III standing, *Valley Forge College* v. *Americans United*, 454 U.S. 464, 476 n.13 (1982), the Ninth Circuit did not abuse its discretion in denying intervention. *Warth v. Seldin*, 422 U.S. 490 (1975) (court within its discretion to deny intervention where standing is lacking).

CONCLUSION

For these reasons, the Petitions for Writs of Certiorari should be denied.

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[26] Even if standing were not a complete bar to Petitioners' intervention, Petitioners have not established the requisite criteria for intervention as of right. Neither Petitioner can lawfully claim an interest in the subject transaction, for they lack the capacity and their claimed injuries are speculative at best. Second, since they have no right to protect the claimed interests, there is nothing to impair or impede. Third, any interest they might have in the effect of federal regulation on the State and its citizens is well represented by the State.

Respectfully Submitted,

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